Supreme Court, U. S.
FILED
OCT 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 19__

No. 78-321

Rodney Dale Reeves ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

BILL CLINTON
Attorney General

By: JAMES L. KEARNEY
Assistant Attorney General
Justice Building
Little Rock, Arkansas 72201

Attorneys for Respondent

Req. No. 78-5226

45 Copies

Index

Page

Opinion Below 1

Jurisdiction 1

Question Presented 1

Argument 5

Conclusion 12

Appendix "A"

Affidavit from Ron Fields, Deputy Prosecutor 13

Appendix "B"

Petition for Hearing on Indigency Status 15

Appendix "C"

Order 18

CASES CITED

Barnes v. *State of Arkansas*, 258 Ark. 565,
528 S.W. 2d 370 (1975) 8

Blue v. *United States*, 342 F. 2d 894
(D.C. Cir. 1965), cert. denied 380 U.S. 944,
85 S. Ct. 1029, 13 L. Ed. 2d 964 (1965) 8

Coleman v. *Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970) 6, 9

Coleman v. *State of Arkansas*, 257 Ark. 538, 518 S.W. 2d 487 (1975) 7

Hansen v. *United States*, 393 F. 2d 763 (8th Cir. 1968), cert. denied 393 U.S. 833, 89 S. Ct. 103, 21 L. Ed. 2d 103 (1968) 8

Norrell v. *Coulter*, 218 Ark. 870, 239 S.W. 2d 280 (1951) 7

Phillips v. *State of Arkansas*, 162 Ark. 541, 258 S.W. 403 (1924) 8

Pointer v. *State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) 9

United States v. *Bartlett*, 449 F. 2d 700 (8th Cir. 1971), cert. denied 405 U.S. 932, 92 S. Ct. 990, 30 L. Ed. 2d 808 (1972) 9

United States v. *Garcia*, 555 F. 2d 708 (9th Cir. 1977) 9

ARKANSAS RULES OF CRIMINAL PROCEDURE

Rule 17.1 2

ARKANSAS CONSTITUTION

Article 2, § 10 4

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM, 19____

No. _____

Rodney Dale Reeves ..... *Petitioner*

vs.

State of Arkansas ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at 263 Ark. 227, 564 S.W. 2d 503 (1978) and is reproduced in the appendix to the petition for certiorari at page 15.

JURISDICTION

The Supreme Court of the United States has jurisdiction over this matter under 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether the opinion of the Arkansas Supreme Court affirming the judgment of the Sebastian County Circuit Court

deprives the petitioner of his right to counsel at a critical stage in the proceedings when he was denied appointed counsel at his preliminary hearing in the Fort Smith Municipal Court?

STATEMENT OF THE CASE

The statement of this case is properly and accurately set forth in the petition for certiorari.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

RULE 17. DISCLOSURE TO DEFENDANT

RULE 17.1 Prosecuting Attorney's Obligations.

(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grant jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant's premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose

to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Arkansas Constitution, Art. 2 §10

In all criminal prosecutions the accused shall enjoy the right . . . to be heard by himself and his counsel.

ARGUMENT

I.

WHETHER THE OPINION OF THE ARKANSAS SUPREME COURT AFFIRMING THE JUDGMENT OF THE SEBASTIAN COUNTY CIRCUIT COURT DEPRIVES THE PETITIONER OF HIS RIGHT TO COUNSEL AT A CRITICAL STAGE IN THE PROCEEDINGS WHEN HE WAS DENIED APPOINTED COUNSEL AT HIS PRELIMINARY HEARING IN MUNICIPAL COURT?

Petitioner, Rodney Dale Reeves, was charged by information dated November 17, 1976, with theft by receiving in violation of Ark. Stat. Ann. § 41-2206 (Crim. Code 1975), and was further charged under the Habitual Criminal Act, Act 280 of 1975. Prior to being charged in circuit court, an information was filed in the Fort Smith, Arkansas Municipal Court. The petitioner appeared in Municipal Court on October 16, 1976, was arraigned, found to be indigent, and was assigned the Public Defender as counsel.

Subsequently, on October 27, 1976, a hearing was requested by the prosecutor to further consider the petitioner's status as an indigent. Such hearing was held on November 1, 1976, at which time the petitioner appeared accompanied by counsel. The municipal court found the petitioner not to be indigent and his appointed counsel was dismissed. Petitioner's preliminary hearing was delayed for two weeks in order to allow him time to retain counsel.

The petitioner appeared before the municipal court, without counsel, for his preliminary hearing on November 16,

1976. The hearing resulted in the petitioner's being bound over to Sebastian County Circuit Court on the aforementioned felony charges. Prior to petitioner's trial, the Sebastian County Circuit Court found petitioner to be indigent and appointed counsel to represent him. Petitioner now alleges that in view of the fact that he was found to be indigent by the circuit court, he should have received the benefit of appointed counsel at his preliminary hearing, and that failure to receive such services of counsel constitutes prejudicial error.

In *Coleman* v. *Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970), this Court held that the Alabama preliminary hearing is a critical stage of the state's criminal process at which the accused is entitled to the assistance of counsel. The petitioner herein contends that he was denied the assistance of counsel at his preliminary hearing in violation of this Court's decision in *Coleman* v. *Alabama*, *supra*, and that such denial hindered the preparation of his defense. For the reasons hereinafter stated, respondent submits that the petitioner was not denied the right to counsel, nor was he prejudiced by his lack of counsel at the preliminary hearing.

This Court's decision in *Coleman* v. *Alabama*, *supra*, does not mandate the presence of counsel at the preliminary hearing, it merely requires that an indigent accused be afforded the right to counsel. As is evident from the record the petitioner herein was not indigent at the time of his preliminary hearing nor was he denied the right to counsel.

Subsequent to petitioner's original appearance in municipal court at which he was found to be indigent, he appeared in Sebastian County Circuit Court for an indigency hearing in an unrelated case. At such hearing, evidence was

presented to the effect that the petitioner had received in excess of twelve thousand dollars ($12,000) for services rendered unto a construction company between January and October of 1976. In addition, it was revealed that the petitioner was the owner of seven (7) automobiles. [See Appendix "B"] As a result of such testimony, the state requested a full hearing on petitioner's indigency status in the present case.

At the November 1, 1976 hearing in municipal court the petitioner, who was at that time represented by the Public Defender, testified that he currently had money on his person. Upon request, the petitioner displayed twelve one-hundred dollar bills and some smaller bills in open court. [See Appendix "A"] As a result of the hearing, the examining court found petitioner not to be indigent and his appointed counsel was dismissed.

A strong presumption of validity attaches to findings made by a court of competent jurisdiction. *Coleman* v. *State*, 257 Ark. 538, 518 S.W. 2d 487 (1975); *Norrell* v. *Coulter*, 218 Ark. 870, 239 S.W. 2d 280 (1951). Thus, in the present case, the municipal court's finding that the petitioner was not indigent is presumed to be correct.

Subsequent to the municipal court's November 1, 1976 determination that the petitioner was not indigent, the preliminary hearing which had originally been scheduled for that date was rescheduled to November 8, 1976 in order to allow the petitioner time to retain counsel of his choosing. (T. 83) At the petitioner's request, the preliminary hearing date was again delayed until November 16 to allow the petitioner more time to retain counsel if he so desired. (T. 83-84) On November 16,

1976, the petitioner appeared at the preliminary hearing without counsel, and the court proceeded with the hearing.

Article 2 § 10 of the Arkansas Constitution provides that an accused in a criminal prosecution shall enjoy the right to be heard by himself and his counsel. Arkansas cases have clearly recognized the right of an accused to conduct his own defense if he so elects. *Barnes* v. *State*, 258 Ark. 565, 528 S.W. 2d 370 (1975). The law does not provide that an accused person must have counsel in a preliminary examination. That is a privilege which he may or may not take advantage of as he chooses. *Phillips* v. *State*, 162 Ark. 541, 547, 258 S.W. 403 (1924). Thus, in view of the fact that the petitioner had been found not to be indigent, coupled with the aforementioned authorities, the petitioner was deprived of no constitutional rights by the court's proceeding with his preliminary hearing without the assistance of counsel.

Respondent further notes that at least one federal court has held that the proper method for the redress of alleged infirmities in preliminary proceedings is through intervention by habeas corpus or mandamus prior to trial. See, *Blue* v. *United States*, 342 F. 2d 894 (D.C. Cir. 1965), cert. denied 380 U.S. 944, 85 S. Ct. 1029, 13 L. Ed. 2d 964 (1965). The record discloses that no such remedy was sought by petitioner in regard to his alleged denial of counsel at his preliminary hearing.

Even if error had occurred in proceeding with the preliminary hearing without the petitioner being represented by counsel, such error must be prejudicial to the accused's substantial rights, including the preparation of his defense, before relief will be granted. *Hansen* v. *United States*, 393 F. 2d 763 (8th Cir. 1968), cert. denied 393 U.S. 833, 89 S. Ct. 103, 21 L. Ed. 2d

103 (1968); *United States* v. *Garcia*, 555 F. 2d 708 (9th Cir. 1977). The burden is on the accused to demonstrate that prejudicial error has been committed. *United States* v. *Bartlett*, 449 F. 2d 700 (8th Cir. 1971), cert. denied 405 U.S. 932, 92 S. Ct. 990, 30 L. Ed. 2d 808 (1972). In the present case the petitioner has failed to demonstrate any prejudice resulting from his lack of counsel, as evidenced by the opinion of the Arkansas Supreme Court. [See petitioner's Appendix "A"]

The petitioner alleges that had he been provided counsel, he could have filed and presented a motion to suppress evidence; could have made an intelligent decision as to whether he should testify; and could have made inquiries in line with the reasons set out in *Coleman* v. *Alabama*, *supra*.

The record clearly reveals that petitioner's trial counsel filed a motion to suppress evidence proper to trial and that a full hearing was held on such motion. (T. 13, 89 *et seq.*) Further, the petitioner elected not to testify at the preliminary hearing and thus, nothing said by him at that time could be used against him at trial. Even if the petitioner had testified at the hearing, such testimony could not have been used against him at trial. *Pointer* v. *State of Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) bars the admission of testimony given at a pre-trial proceeding where the accused did not have the benefit of cross-examination by and through counsel.

The *Coleman* inquiries referred to by the petitioner are set out at 399 U.S. 9 as follows:

> First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to

bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital imprachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.

The aforementioned concerns of this Court were rendered moot in the present case by the petitioner's use of Arkansas' rather liberal pre-trial discovery provisions set out in Rule 17.1 of the Arkansas Rules of Criminal Procedure. The record indicates that the petitioner filed a motion to compel discovery prior to trial. (T. 10) Subsequent to the discovery motion, the petitioner filed motions in limine to prevent the introduction of evidence of other offenses committed by the petitioner and also to prevent the introduction of certain items which had been seized by the state. (T. 18, 21) The petitioner also filed an additional motion for exculpatory materials. (T. 23)

At petitioner's April 7, 1977, pre-trial hearing, the State's open-file policy was made known to the trial court by petitioner's counsel. (T. 49, 50) A full hearing was held on petitioner's motion for discovery on April 22, 1977, in the Sebastian County Circuit Court. (T. 53 *et seq.*) At such hearing, petitioner's counsel stated to the trial court that he had investigated the prosecution's files. (T. 56, 57) The remainder of

the hearing was used to complete the discovery process and to rule on petitioner's motions in limine.

The petitioner has failed to affirmatively state any actual prejudice which resulted from his appearance at the preliminary hearing unaccompanied by counsel. As stated by the Arkansas Supreme Court in its opinion below, there were no facts tending to show that the trial court abused its discretion in denying the petitioner's motion for a second preliminary hearing, and the record indicates that Reeves received a fair trial and was well represented. 263 Ark. at 229.

In sum, the petitioner was properly found by the examining court not to be indigent prior to his preliminary hearing. As stated by the Arkansas Supreme Court, in matters of this kind we must depend upon the sound judgment of the trial court unless a clear abuse of discretion in making its determination has been shown. That showing has not been made in this case. 263 Ark. at 230. Even the speculative prejudice alleged by the petitioner in the instant case is to no avail, as those areas of concern were rendered moot by the petitioner's use of the pre-trial discovery procedures. Thus, in view of petitioner's election to appear before the municipal court unaccompanied by counsel, coupled with his failure to demonstrate any actual resultant prejudice, his petition should be denied by this Court.

CONCLUSION

For the aforementioned reasons and authorities, the respondent requests that petitioner's application for a Writ of Certiorari be denied, for his allegations are without support in fact or in law.

Respectfully sumbitted,

BILL CLINTON
Attorney General

By: JESSE L. KEARNEY
Assistant Attorney General
JUSTICE BUILDING
LITTLE ROCK, ARKANSAS 72201

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Jesse L. Kearney, Assistant Attorney General, do hereby certify that a copy of the foregoing Brief for Respondent in Opposition has been served upon petitioner by placing three (3) copies of the same in the United States Mail, postage prepaid to Robert S. Blatt, Attorney at Law, P. O. Box 1825, Fort Smith, Arkansas 72012, attorney for petitioner, on this 18 day of October, 1978.

JESSE L. KEARNEY
Assistant Attorney General

APPENDIX "A"

AFFIDAVIT

Comes now Ron Fields and being first duly sworn states upon oath:

My name is Ron Fields and I am a Deputy Prosecuting Attorney for the Twelfth Judicial Circuit, State of Arkansas. I was present during a hearing on Rodney Dale Reeves in CR 74-47 during which time there was testimony that Rodney Dale Reeves had been paid approximately $26,000.00 over a period of around one year for brick work by a local company. Based upon these facts I requested an indigency hearing be held in the Fort Smith Municipal Court on the cases that were then pending in that court against Rodney Reeves. (See attached exhibits) During the course of that hearing Rodney Reeves, represented by the Public Defender, took the witness stand on his own behalf and testified. During cross-examination I inquired of Mr. Reeves if he currently had money on his person. The question was prompted by the fact that we had received information that Reeves habitually carried fairly large sums of money. Reeves at that time stated he did and on a further request that he count out the money for the Court displayed twelve one-hundred dollar bills and some smaller bills. At the conclusion of the hearing the Judge found that Rodney Reeves was not an indigent.

/s/ Ron Fields
RON FIELDS, Affiant

Subscribed and sworn to before me this 10th day of October, 1978.

/s/ Lynda Ray
Notary Public

My Commission expires:
July 1, 1979

APPENDIX "B"

IN THE MUNICIPAL COURT
OF SEBASTIAN COUNTY
FORT SMITH DISTRICT

STATE OF ARKANSAS — PLAINTIFF

VS.

RODNEY DALE REEVES — DEFENDANT

PETITION FOR HEARING ON INDIGENCY STATUS OF RODNEY DALE REEVES

Comes now Charles Karr, Prosecuting Attorney in and for the Twefith Judicial Circuit, State of Arkansas, and moves the Court that a hearing be held to determine whether or not Rodley Dale Reeves is an indigent and as grounds for the motion alleges and states:

I.

That Rodney Dale Reeves is currently charged in this Court with the offense of Theft by Receiving, a felony.

II.

That on October 15, 1976, Rodney Dale Reeves was arraigned on the Theft by Receiving charge in the Fort Smith Municipal Court and stated at that time before the Bench that he did not have funds to hire an attorney with. That the Court at that time appointed a public defender to represent Mr. Reeves.

III.

That on October 15, 1976, a hearing was held in the Sebastian County Circuit Court concerning the indigency status of Rodney Dale Reeves in Circuit Case No. 74-47.

IV.

That at that hearing a Mr. Otwell testified that he is the part owner of a construction company and that in 1975 his construction company paid Rodney Dale Reeves $12,673.00 for his services to that company. Mr. Otwell further testified that from January 1, 1976 to October of 1976 Mr. Reeves had already been paid $12,479.00 for services to the company. This amount did not include a $1200.00 payment made in the past month to Mr. Reeves. The total of these payments over the last two years was $26,352.00.

V.

That at that hearing Mr. Rodney Reeves testified that that amount of money received had not been diminished by any State or Federal taxes due to the fact that he had not filed returns on any of those sums.

VI.

That at that hearing Mr. Reeves testified that he was the owner of seven automobiles.

VII.

That Mr. Rodney Reeves obtained a divorce in November

of 1975 and at that divorce was represented by paid legal counsel. That as a result of the agreement of the divorce Mr. Reeves is under no child support obligations whatsoever.

WHEREFORE, petitioner requests that the Court schedule a hearing on this matter and that publically paid legal counsel be denied Mr. Reeves in his case.

Respectfully submitted,

Charles Karr
Prosecuting Attorney
By: /s/ Ron Fields
Ron Fields
Deputy Prosecuting Attorney

APPENDIX "C"

IN THE MUNICIPAL COURT OF
SEBASTIAN COUNTY, ARKANSAS

FORT SMITH DISTRICT

STATE OF ARKANSAS — PLAINTIFF

VS.

RODNEY DALE REEVES — DEFENDANT

ORDER

On this 28th day of October, 1976, comes before the Court the petition of the State of Arkansas. The Court finds the petition for a hearing on the indigency status of Rodney Dale Reeves should be honored and, therefore, Rodney Dale Reeves is hereby ordered to appear before the Fort Smith Municipal Court at 10:00 A.M., on Monday, November 1, 1976, to show cause why the services of the Public Defender should not be denied him.

IT IS SO ORDERED.

/s/ Lawson Cloninger
Lawson Cloninger
Municipal Judge